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13 UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 NATIONAL LABOR RELATIONS
16 BOARD,

17 Applicant,

18 v.

19 KAVA HOLDINGS, LLC, A
20 DELAWARE LIMITED LIABILITY
21 COMPANY, FORMERLY KAVA
22 HOLDINGS, INC., A DELAWARE
23 CORPORATION, D/B/A HOTEL
24 BEL-AIR,

25 Respondent.

)
) Case No. 2:17-mc-00071-GW-RAO
)
)
) APPLICANT'S ADDITIONAL
) BRIEFING TO APPLICATION FOR
) SUMMARY ORDER REQUIRING
) OBEDIENCE WITH
) ADMINISTRATIVE SUBPOENAS
) *DUCES TECUM*
) Date: June 8, 2017
) Time: 10:30 a.m.
) Courtroom: United States Courthouse,
) 312 N. Spring St.
) Los Angeles, CA, 90012
) Courtroom F, 9th Floor

I. PROCEDURAL HISTORY

On May 16, 2017, the National Labor Relations Board (the NLRB, the Board or Applicant) filed with this Court an Application for a Summary Order Requiring Obedience with Administrative Subpoenas *Duces Tecum* (Application) against Respondent KAVA HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, FORMERLY KAVA HOLDINGS, INC., a DELAWARE CORPORATION, D/B/A HOTEL BEL-AIR (Respondent). The Application seeks to require Respondent to comply with administrative trial subpoenas *duces tecum* Nos. B-1-VNIFH7 and B-1-VNIFH7 (subpoenas) issued by the Board's Region 31 Regional Office and duly served on Respondent in the manner provided by law. On May 24, 2017, Respondent filed its Opposition to the Application.

On June 8, 2017, the parties appeared for a telephonic hearing before the Honorable Rozella A. Oliver, U.S. Magistrate Judge. The District Court heard argument regarding the NLRB's application to enforce its subpoenas. In light of the discussion at the hearing, the District Court ordered that, on or before June 13, 2017, each party shall submit to the Court additional briefing regarding:

- 1 1) Whether the administrative law judge in the underlying proceeding
2 limited the scope of, or held irrelevant matter sought by, Item 12(k) of
3 the first subpoena¹; and
4
- 5 2) If so, to what extent that determination constrains the District Court's
6 analysis with respect to the application to enforce the subpoena.
7

8 **II. FACTS**

9 Item 12(k) seeks, for open positions at the Respondent's Facility leading up
10 to its reopening in October 2011, performance evaluations and awards issued by
11 Respondent to former employee applicants. On March 13, 2017, during the
12 administrative hearing on the merits of the underlying case, Respondent filed a
13 petition to revoke the first subpoena with Administrative Law Judge Lisa
14 Thompson (ALJ Thompson or Judge Thompson).² Respondent, in its petition,
15 objected to Item 12(k) on ground that the request was vague, incomprehensible,
16 and did not describe with particularity the documents whose production was
17 requested. (Exhibit 5 to Palencia's Declaration, page 78).
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21 On the second day of the hearing, March 14, 2017, Judge Thompson ordered
22 Respondent to produce documents responsive to Item 12(k) by close of business
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25 ¹ The first subpoena refers to subpoena B-1-VI31ZX.

26 ² A copy of the Respondent's petition to revoke is attached as Exhibit 5 to
27 Palencia's Declaration in Support of Application for a Summary Order Requiring
28 Obedience with Administrative Subpoena *Duces Tecum* (Palencia's Declaration).

1 March 16, 2017. (Exhibit 10 to Palencia's Declaration (referred to hereafter as
2 Exhibit 10), page 233 (lines 5-12)).³ While Item 12(k) requested performance
3 evaluations and awards issued by Respondent to **former employee applicants**, the
4 ALJ limited production to all **aggrieved employees**. (Exhibit 10, page 244 (lines
5 12-14)).⁴ In so ruling, the ALJ stated her view that the documents were part of or
6 could be part of the General Counsel's prima facie case, specifically the issue of
7 whether alleged discriminatees were qualified for the positions at issue in the first
8 place. (Exhibit 10, pages 231 (lines 20-25) and 232 (lines 1-11)).
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12 **III. THE DISTRICT COURT IS NOT LIMITED BY THE ALJ'S RULING**
13 **CONCERNING ITEM 12(K) OF THE FIRST SUBPOENA.**
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16 ³ Initially, ALJ Thompson had granted, without prejudice, the Respondent's
17 petition to revoke with respect to request Item 12 (k). (Exhibit 10, page 175 (lines
18 16-21)).

19 ⁴ The Complaint includes an Appendix A which sets forth the alleged
20 discriminatees known at the time of Complaint issuance. However, Counsel for the
21 General Counsel made clear that she intended to amend Appendix A before resting
22 her case in chief based on documents provided by Respondent. Consistent with this
23 understanding, on April 4, 2017, Counsel for the General Counsel e-mailed
24 Respondent a letter which is attached as Exhibit 13 to Palencia's Declaration
25 requesting compliance with outstanding subpoena items. Counsel for the General
26 Counsel attached to her letter a list of former employee applicants not hired,
27 employees who appear to have been hired based on the Respondent's payroll
28 report and persons who appear only once on the payroll report. (Exhibit 13, page
424). This list is an update to the list contained in the Appendix to the Amended
Complaint and was compiled based on information obtained during the hearing and
subpoenaed documents. Identified on this list as number 31 and a former employee
applicant not hired is "Matt//Matthew Lambert."

A. The Special Appeal Procedures Available During the Unfair Labor Practice Hearings Establish that the ALJ's Subpoena Rulings Are Not Final and Binding.

The NLRB has delegated to its administrative law judges the authority to rule on petitions to revoke subpoenas during unfair labor practice hearings, subject to review by the Board upon appeal by an aggrieved party. 29 C.F.R. §§ 102.26, 102.31(b) and 102.35(3). Section 102.26, entitled Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal, states, in part, as follows:

Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the Administrative Law Judge on motions and/or by the Administrative Law Judge on objections, and related orders, may not be appealed directly to the Board except by special permission of the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the Administrative Law Judge, together with the appeal from such ruling, must be filed in writing promptly and within such time as not to delay the proceeding, and must briefly

1 state the reasons special permission may be granted and the grounds
2 relied on for the appeal. . . . If the Board grants the request for special
3 permission to appeal, it may proceed immediately to rule on the
4 appeal.
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6 Given these special appeal procedures, the rulings of the ALJ are not final and
7 binding.
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9 **B. The District Court Should Independently Determine Whether the**
10 **Information Sought by the Subpoena Is Relevant**
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12 United States District Courts receive their power to order enforcement of
13 subpoenas by the Board by virtue of Section 11(2) of the Act.⁵ The District Court's
14 role in the instant subpoena enforcement proceeding is limited to a determination
15 of whether to enforce the subpoenas and, so long as the evidence requested by the
16 Board's subpoena relates to or touches upon the matter under investigation or in
17 question, the subpoena must be enforced without preliminary inquiry by the Court
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22 ⁵ That section states, in part: In case of contumacy or refusal to obey a subpoena
23 issued to any person, any United States district court . . . within the jurisdiction of
24 which the inquiry is carried on or within the jurisdiction of which said person
25 guilty of contumacy or refusal to obey is found or resides or transacts business,
26 upon application by the Board shall have jurisdiction to issue to such person an
27 order requiring such person to appear before the Board, its member, agent, or
28 agency, there to produce evidence if so ordered, or there to give testimony
touching the matter under investigation or in question..... 29 U.S.C. § 161 (2).

1 to determine whether there is probable cause to believe that an asserted violation of
2 law exists.⁶

3 In *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492 (4th Cir. 2011), the
4 Court of Appeals held that it was necessary for the District Court to review
5 documents in camera to make a determination regarding privilege rather than defer
6 to the ALJ. 2011). While the underlying issue in *Interbake* was privilege, the
7 Court's reasoning is applicable here. The case makes it clear that once a matter is
8 before the District Court, the court must make its own evaluation and
9 determination on the objection being raised and that, in carrying out this judicial
10 function, the District Court should not delegate its task to the ALJ. *Id.* at 498.

14 Similarly, in *N.L.R.B. v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999),
15 the Sixth Circuit held that the District Court erred in directing an ALJ to determine
16 if certain documents subpoenaed by the National Labor Relations Board were
17 privileged. *Id.* at 603. The Court of Appeals ruled that the District Court did not
18 have the discretion to delegate the determination to the ALJ. *Id.* at 603–04. See
19 also, *NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110 (9th
20 Cir.1981) (holding that “challenges to agency subpoenas must be resolved by the
21 judiciary before compliance can be compelled”).
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26 ⁶ *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87
27 L.Ed. 424 (1943).

1 Of particular note, during the investigation stage of the unfair labor practice
2 charge underlying this case, the Region issued an investigatory subpoena
3 (subpoena *duces tecum* B-638786) which contains a very similar request to Item
4 12(k). Item 1 of the investigatory subpoena sought:
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6 “1. For each applicant for employment in connection with the Employer’s
7 2011 reopening who was a former employee of the Employer:
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9 a. Performance evaluations for their last two years of employment;

10 b. Job application;

11 c. Documents reflecting the Employer’s assessment and evaluation of
12 the applicant, including, but not limited to all interviewer notes and
13 evaluations;
14

15 d. To the extent not covered by paragraph 1c., documents reflecting
16 the Employer’s decision to hire or not to hire the applicant.”
17

18 The Respondent filed a petition to revoke that subpoena, which the Board denied.
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20 Attached hereto as Exhibit 1 is a copy of the Board’s Order Denying the Petition to
21 Revoke and as Exhibit 2 is a copy of the Respondent’s Petition to Revoke the
22 Subpoena and the Investigatory Subpoena. In denying the Respondent’s petition to
23 revoke, the Board ruled that the documents sought in the subpoena were relevant.
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25 Specifically, the Board held that,
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1 The subpoena seeks information relevant to the matter under
2 investigation and describes with sufficient particularity the evidence
3 sought, as required by Section 11(1) of the Act and Section 102.31(b)
4 of the Board's Rules and Regulations. Further, the Employer has
5 failed to establish any other legal basis for revoking the subpoena.⁷
6

7 Based on the foregoing, it is clear that the information sought by Item 12(k),
8 information of the type already found to be relevant by the Board in this
9 matter, is relevant and the subpoena should be enforced.
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11 IV. CONCLUSION

12 For the reasons set forth above and in its Application, the Applicant
13 respectfully submits that the District Court is not bound by the ALJ's ruling and
14 should enforce subpoena request 12(k) as drafted, without the limitation imposed
15 by the ALJ, as it seeks relevant information.
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21 ⁷ As noted in footnote 1 of the Board's Order, in considering the petition to revoke,
22 the Board evaluated the subpoena in light of the Region's statement that it is
23 willing to clarify the scope of the subpoena so that the term "applicant" is defined
24 as "any individual applying for a position or positions at the Employer, which
25 positions perform, in whole or substantially, work that was previously performed
26 by employees in the bargaining unit as described in Section 3.A. of the August 16
27 to September 30, 2009 collective-bargaining agreement." The Board further noted
28 that it appeared that the Region's reference to "August" 16 is a typographical error,
and it has interpreted this as a reference to the parties' collective-bargaining
agreement effective from April 16, 2006 to September 30, 2009.

1 Dated at Los Angeles, California, this 13th day of June, 2017.

2
3 Respectfully submitted,
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6 Attorney

7 /s/ Edna Y. Palencia

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